No. 93-539

IN THE

Supreme Court of the United States

October Term, 1993

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Petitioner,

against

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR PETITIONER ATTORNEY GENERAL OF THE STATE OF NEW YORK

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Reply Brief for Petitioner Attorney General of the State of New York

POINT I

Respondents' argument is premised on several mischaracterizations of fact.

Respondents' argument is based on the misconception that the Satmarer's religion requires that their students be educated separately from non-Satmar students.

Respondents persist in characterizing the problem that the Satmar children have in attending school at the Monroe-Woodbury public school buildings as a need for exclusivity

"dictated by religious beliefs and traditions" (Br, p 11; *see also,* 18, 23, 24 n 2, 25, 28, 33). Their argument depends on this mischaracterization of fact. As described in our main brief, there is no religious requirement that the Satmar children be educated separately from non-Satmar children. If that were so, the Satmar children would never have gone to those public schools at all. Their parents sought special educational services outside the Monroe-Woodbury public school buildings after the experiment of sending their children there failed, claiming that the Monroe-Woodbury school did not provide them with an appropriate education as required by law. In their view, it did not adequately address their unique bilingual[1] and bicultural needs or their psychological and emotional difficulties in attending classes in an environment not only alien to these special children's world view, but sometimes hostile as well. The fact that the source of these secular concerns is a religious and insular lifestyle does not change their fundamental nature.

The school district authorized by Chapter 748 does not cater to religious precepts.

Respondents also mischaracterize the nature of the school district authorized by the legislation. They write, "this case involves the extraordinary measure taken by the State of New York of creating a public school district for the exclusive benefit of a religious community in order to oblige the

[1]Respondents misunderstand the request for bilingual services to mean instruction in Yiddish (Br, p 35). The primary language of instruction would be in English, together with the same sort of bilingual and bicultural instruction that teachers in other districts provide to groups such as Hispanics and Asians. This is what the Kiryas Joel school district was created to and does provide (R739).

religious beliefs and practices of that community. . . [The legislation] requires the State of New York itself to allocate its resources in the pursuit of the religious beliefs and traditions of the Satmar community" (Br, p 28).

First, the school district was not created for the sole benefit of a religious community. Rather, it was created to meet certain educational needs the legislature decided were not being met by Monroe-Woodbury. Like any other public school district, it may also serve students who are not part of that community. As Dr. Benardo explained in his affidavit (R741), the district does serve many non-Satmar students whose language and cultural needs could not be met by their resident school districts. (In fact, Dr. Benardo was told that his is the only bilingual special education program in eight counties serviced by the Department of Education's technical assistance center [R737].) At the same time, if a non-Satmar family with a handicapped child moved into the village of Kiryas-Joel that child may attend school there. It is only the non-disabled students who would have to be tuitioned to another school district because there is no school for them there, and *not* because they are non-Satmar as respondents suggest (Br, p 24).

Second, Chapter 748 does not allocate resources in pursuit of the religious beliefs or traditions since the school must operate in a secular manner, which means there may be no religious instructions or any religious involvement in its operation. (*See*, Benardo affidavit, R734, *et seq.*, which reflects that understanding in the actual operation of the school; *see also*, Governor's Approval Memorandum in which the Governor recites his understanding that the village officials made the commitment to operate the district within constitutional boundaries).

The legislation did not grant the power to a religious organization to operate a public school district.

The third premise central to respondents' argument is the assumption that the village is completely dominated by the rabbi and religious authorities so that the grant of a school district puts political power into the hands of the Satmar religious organization in violation of the Establishment Clause, as enunciated in *Larkin v Grendel's Den, Inc.*, 459 US 116 (1982). In that case a Massachusetts statute granted the power to the governing body of a church to veto applications for liquor licenses within a 500-foot radius of the church (Br, pp 23-24).[2] The legislation challenged here, on the other hand, grants the *residents of the village of Kiryas Joel*, not any religious organization or body, the political power to operate a school district. They must vote for a board of education in a democratic process. Respondents charge that the power of the religious leader is so strong that he effectively controls the electoral process, making the school board it elected his instrument.

In the first place, there is no basis in the record for such an assumption. Whether it is so is a question to be raised in a challenge to the legislation as applied; but it is certainly not appropriate here where the challenge to the legislation is only a facial one and the appeal is from a grant of a motion for summary judgment. Respondents base their description of the Satmar community on allegations made in one of the affidavits they submitted to the trial court in support of their

[2]The language of the statute is as follows: "Premises . . . located within a radius of five hundred feet of a church or school shall not be licensed for the sale of alcoholic beverages if the governing body of such church or school files written objection thereto. . ." *Larkin v Grendel's Den, Inc.*, 459 US at 117.

motion for summary judgment (Br, p 2). These are no substitute for fact and are nothing more than allegations. Indeed, the existence of a dissident group in Kiryas Joel which garnered 673 votes (out of a total of 1,789 ballots that were cast [R487]) for its unsuccessful candidate for the board and which filed an *amicus* brief against the petitioners in this case militates against their claim.[3]

In the second place, the extent of the rabbi's influence over the residents has no bearing on the constitutionality of a law authorizing the creation of a secular public school district formed and governed under the same secular laws as any other New York State public school district. Since the legislation gives the residents the political power, they are free to choose how they are influenced. In addition, as we explained in our principal brief (p 22), even those involved in religious organizations can wear different hats for differ-

[3]Two amici (National Coalition for Public Education and Religious Liberty and National Education Association and Committee for the Well-Being of Kiryas Joel) lodged several papers with the Court in an attempt to show that the community is run as a theocracy from which outsiders are restricted. We join with petitioners Board of Education of Kiryas Joel and Board of Education of Monroe-Woodbury in opposing these lodgings as a highly improper attempt to supplement the record. The lodged material purports to consist of affidavits submitted in another unrelated lawsuit concerning a religious matter, a deposition taken in another unrelated action, copies (in Yiddish along with English translations) of proclamations made by religious authorities and a translation of a speech made by Rabbi Aaron Teitlbaum. The material contained on these pages is not something of which the Court can take judicial notice. *See*, Stern, R., Gressman, E., Shapiro, S. & Geller, K., *Supreme Court Practice* (7th ed. 1993) at 556. Indeed, this is the sort of material that could be explained or disputed by the petitioner Board of Education of Kiryas Joel if given the opportunity. Therefore, we join the other petitioners in their request that these purported documents be rejected.

ent purposes, and a religious person may hold public office and execute his or her duties without violating the constitution. *See, McDaniel v Paty,* 435 US 618 (1978).

The key here is that the legislation did not grant governmental power to a religion or a religious organization, nor did it proceed on the assumption that a religious organization would in fact operate the school.

POINT II

The legislature crafted a reasonable and practical solution to the problem that is not subject to challenge as overbroad or extraordinary.

The sweep of the legislation does not affect its constitutionality under the Estal lishment Clause.

Respondents and several *amici* also claim that the legislation creating a new school district went further than it had to to solve a problem involving only the handicapped children and argue that its "overbreadth" is an indication that the State accomplished an impermissible symbolic union of church and State (Br, pp 20, 32-33). The two ideas do not follow. The existence of alternative solutions which some might consider preferable or more direct is not evidence that the legislature and governor carried out a surreptitious mission to favor the Satmarer, contrary to their expressed intentions, by giving them more than what these critics believe was necessary. As with most legislative remedies, no single option is perfect. Here, the legislature arrived at a reasonable solution to a problem that could be solved by neither the parties nor the courts. As long as that solution meets

Lemon standards, it is improper to second-guess its wisdom or whether it was the best solution possible.

There is no single correct solution. Every proposal has some legal or practical problem. For example, Judge Kaye of the New York Court of Appeals rejected chapter 748 as conferring a denominational preference prohibited by the Establishment Clause. She applied the strict scrutiny test outlined in *Larson v Valente*, 456 US 228 (1982), and found that the legislation failed because it was not narrowly tailored enough to meet the State's interest in educating the Kiryas Joel children. In its place she suggested passage of a statute that would force Monroe-Woodbury to relinquish the discretion enjoyed by all school districts under the New York Education Law and that would direct them to provide the Kiryas Joel students with a neutral site. Yet that legislation could face the same claims of improper benefit and promotion of the interests of a religious group that the respondents and *amici* are making here. Moreover, a potent argument could be made that in removing Monroe-Woodbury's discretion the legislature was showing an impermissible preference for the Satmar sect over the general population of Monroe-Woodbury and that the strict scrutiny standard outlined in *Larson v Valente*, must be applied. This solution may or may not be found to be narrowly tailored enough to fit a compelling state interest. Additionally, this proposal may have equal protection problems in that the residents of Monroe-Woodbury, unlike residents in any other district, would have no control through their elected board of education over how services are to be provided to the special needs children of Kiryas Joel.

New York's legislature and governor were in the best position to judge how best to solve the problem practically

and for the reasons described in our main brief we submit that the choice they made is well within the boundaries of the Establishment Clause. In contrast to Judge Kaye's proposal, chapter 748 shows no preference in favor of the Satmar over the residents of the Monroe-Woodbury district or over any other religious or non-religious group. It granted them no more than what everyone else already had and what the law entitled them to: a free appropriate public education in an environment conducive to educational progress. No additional funds were promised, nor were the Satmar exempt from any obligations applicable generally. No one was burdened by the creation of the new district, least of all those most directly affected by the legislation—the residents of the district out of which it was carved. Therefore, it is not appropriate to apply the strict scrutiny test enunciated in *Larson v Valente,* as advocated by Judge Kaye and by some *amici.*

The fact that the legislation was aimed at a particular segment of the population does not translate into preferential treatment for the Satmar.

There is no merit to the contention advanced by the respondents that the benefit granted by the legislation evidenced a preference for the Satmar sect. While the legislation was aimed at a particular section of the population, which consists of those living in Kiryas Joel as well as all the residents within Monroe-Woodbury's boundaries, the local nature of the legislative solution should not be confused with favoritism. It was the local nature of the problem that dictated a local solution, and resulted in a special piece of legislation aimed at that problem alone. The statute neither gave the Satmarer extra funds, special services not

enjoyed by others or license to operate a school which complied with their religious tenets.

Nor, for that matter, should the lines drawn around the village be construed as creating segregation along religious lines (Br, pp 20, 25, 44). The lines were drawn merely around those who had a similar problem in order to resolve it.

Viewed another way, the State was adjusting its laws to allow for the delivery of the services it is required to furnish to the students of Kiryas Joel under federal and state law. (*See*, our main brief, p 4 n 2 for citations.) Before the creation of the Kiryas Joel school district the impasse that lay between the residents of Kiryas Joel and the Monroe-Woodbury board of education made delivery under the existing laws impossible.

CONCLUSION

For the reasons stated here and in petitioners' principal brief, the order of the Court of Appeals should be reversed.

Dated: Albany, New York
March , 1994

Respectfully submitted,

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